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ABSTRACT

The development of drug testing policies and the implementation of drug testing procedures involve legal, ethical, medical, and labor relations issues. To learn how police departments are addressing the problem of drug use and drug testing of police officers, the National Institute of Justice sponsored a telephone survey of 33 major police departments, 24 of which had drug testing programs. This report presents results of the survey and reviews the use of drug testing in police departments, the technology involved, and the legal and union issues related to testing. It also summarizes private industry's approach to the problem and alternatives used by police administrators for dealing with officers found to be using drugs. A section on drug testing in police departments looks specifically at the issues of testing police applicants, testing probationary officers, testing officers in sensitive jobs, testing tenured officers, and scheduled versus random testing. Other survey results are presented to show the trends in current practices in drug testing. (NB)

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Employee Drug Testing Policies in Police Departments

J. Thomas McEwen, Barbara Manili, and Edward Connors

The availability and widespread use of illegal drugs is a cause of national alarm today. Reports of drug abuse come from every segment of our society. Thus it should come as no surprise that the police have not been immune to the contagion of drug abuse. Police officers experience stress and trauma in their jobs and some may turn to drugs as a means of coping.

Drug use by police officers is now an important issue for every police chief in the Nation. The problem is receiving national media attention because of its potential threat to the integrity of law enforcement and the safety of the community.

To learn how police departments are addressing this problem, the National Institute of Justice sponsored a telephone survey of 33 major police de-

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From the Director

Police officers today enjoy a high level of esteem. Thanks to the work of the Nation's police chiefs over the past 15 years, we see increased professionalism on our forces, closer relationships with the community, and rising respect and status for the individual officer.

But that esteem can be sharply eroded and those gains quickly lost when allegations are made that drug use may exist within the force. Police chiefs can be vulnerable unless they have taken reasonable precautions to ensure a drug-free work force.

Speculation about drug abuse can shatter both the integrity of departments and the public respect and trust that the vast majority of officers have earned. Recognizing this fact, many police chiefs are moving to ensure and demonstrate that their departments are drug-free. These chiefs say they view new efforts such as drug testing for officers, not as "admitting the department has a problem," but as part of their responsibility for ensuring a drug-free workplace and setting an example within their communities.

The development of drug testing policies and the implementation of drug testing procedures involve a host of legal, ethical, medical, and labor relations issues. To help law enforcement administrators cope with this new challenge, the National Institute of Justice, at the request of the major law enforcement organizations, has launched an effort to learn how departments are currently dealing with the problem and what further steps should be considered.

This *Research in Brief* reports on the results of a survey of 33 major police departments recently completed for the National Institute by Research Management Associates, Inc. It reviews the use of drug testing in police departments, the technology involved, and legal and union issues relating to testing. It also summarizes private industry's approach to the problem and alternatives used by police administrators for dealing with officers found to use drugs.

There is, I believe, a growing national will to confront and deal with the scourge of drug abuse. It is embodied in President Reagan's initiative for attacking both supply and demand and for achieving a drug-free society—including a drug-free workplace. It is encouraging to see police managers exercising strong leadership in addressing potential drug use within their agencies. The National Institute of Justice intends to support these efforts by sharing new information and ideas.

This *Research in Brief* is a first step. An indepth report on how police agencies are working to minimize the extent of drug use among police employees is scheduled for publication early next year. The report will present a range of options currently in practice so that informed choices can be made.

We welcome the comments and suggestions of administrators and officers so we can act together to ensure the professional integrity of law enforcement in the fight against drugs.

James K. Stewart
Director

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partments. The survey was conducted by Research Management Associates, Inc., of Alexandria, Virginia. Of the 33 departments surveyed, 24 had drug testing programs. These departments explained their testing procedures, selection process, and what procedures were used after a positive test. They also discussed whether treatment programs were available, and whether random testing had ever been considered. Departments provided information on the types of tests conducted, the administration of the tests, the procedures used to establish chain of custody, and the costs of the tests.

Key findings from the survey indicated that:

- 73 percent of the departments surveyed were conducting drug screening tests of applicants.
- Virtually all departments had written policies and procedures for conducting tests when there was reason to suspect that officers were using illegal drugs.
- 21 percent said they were considering mandatory testing of all officers.
- 24 percent indicated that treatment (rather than dismissal) would be appropriate for officers under some circumstances, generally depending on the type of drug and severity of the problem.

These results show that many police managers are taking steps to make their departments as drug-free as possible.

Further impetus for action has come from the International Association of Chiefs of Police (IACP), which recently developed a model drug testing policy for local police departments to consider in identifying and dealing with the use of illegal drugs by police officers. The policy calls for:

- Testing applicants and recruits for drug or narcotics use as part of their pre-employment medical exams;
- Testing a current employee when documentation indicates that the employee is impaired or incapable of performing assigned duties, or experiences reduced productivity, excessive vehicle accidents, high absenteeism, or other behavior inconsistent with previous performance;
- Testing a current employee when an allegation involves the use, possession, or sale of drugs or narcotics, or the use of force, or there is serious on-duty injury to the employee or another person;
- Requiring current sworn employees assigned to drug, narcotics, or vice enforcement units to submit to periodic drug tests.

Many police departments already have policies along these lines. The IACP's endorsement of these steps may encourage other departments to take similar action to deal with employee drug abuse.

This *Research in Brief* reviews both the approaches of private industry to the problem and the use of drug testing in police departments. It summarizes the technology of drug tests, the alternatives used by police administrators for dealing with officers found to use drugs, and legal and union issues surrounding drug tests. It also presents other survey results to show the trends in current practices.

Employee drug testing in private industry

Approximately one-fourth of the country's Fortune 500 firms now test job applicants for drugs, up from 10 percent 3 years ago. In addition to firms in the aerospace, airline, and railroad industries, major firms with applicant drug screening programs include IBM, DuPont, AT&T, General Motors, Ford Motor Company, Exxon, Mobil, Boise Cascade, the *New York Times*, and Capital Cities/ABC.

Advocates of job applicant testing say the benefits include higher quality applicants and, after hiring, reduced absenteeism, higher productivity, and fewer accidents. Some private employers maintain that increased applicant drug testing will become a significant economic deterrent to drug abuse in society, as more and more people face a choice between using drugs or finding a job. On the other hand, a few firms, including Hewlett-Packard and McDonnell Douglas, have publicly opposed urinalysis testing of employees as an invasion of privacy and do not test applicants or current employees.

Some firms require urinalysis tests for current employees under certain conditions. Typically, tests may be conducted when there is reasonable suspicion of drug abuse because of job performance problems, accidents, or for safety or security reasons such as test-flying aircraft and handling classified materials. In addition to urinalysis, private employers have taken other measures to curb drug use, possession, and sale in the workplace. These include the use of local undercover police, drug-sniffing dogs, private investigative and security firms, and searches of employees' lockers and desks.

Because drug addiction and alcoholism are protected handicaps under the Federal Rehabilitation Act of 1973, employees who work for firms with Federal Government contracts may be legally entitled to seek rehabilitation before being terminated. Employers may also have a legal duty under State or local statutes to "reasonably accommodate" employees with drug abuse problems. But the duty and desire to offer treatment opportunities must often be balanced with the responsibility to provide all employees with a safe workplace and maintain the quality of products and services.

About 30 percent of the Fortune 500 largest industrial corporations have inhouse employee assistance programs. Other private employers make referrals and maintain policies that encourage employees to seek treatment. In some companies paid sick leave policies enable employees to enter treatment without loss of salary. Xerox has a toll-free hotline for employees who are reluctant to approach immediate supervisors about substance abuse problems.

Private employers, in the absence of local ordinances or union agreements, appear to have a greater degree of freedom than government agencies in developing drug abuse policies. However, the courts have not resolved many of the relevant legal issues, and a number of lawsuits are pending that challenge both the reliability and constitutionality of private sector drug screening tests and policies. Issues include the company's right to information about an employee's

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private life, the use of relatively expensive corroborative tests for both applicants and current employees whose initial test results are positive, prosecutors' access to company testing records, the submission of policies for collective bargaining with labor unions, the employer's obligation to inform employees that urine samples in routine physicals will be analyzed for drugs, and other privacy and confidentiality issues.

Participants at the March 1986 National Institute of Drug Abuse conference on drug testing in the workplace reached consensus on a number of recommendations for private employers: inform all employees who will be tested, do not test without clear evidence of job performance problems, corroborate all positive tests, protect the confidentiality of the results, and accompany urinalysis testing with opportunities for rehabilitation. Many of these measures may be applicable to police departments.

Testing police applicants and employees

Drug tests have become a key feature of many police department programs to detect and deter the use of illicit substances by employees. Testing may occur as part of the screening process for applicants, as a requirement during the probationary period, as a condition of accepting a transfer, promotion, or assignment to a sensitive position, when officers are suspected of drug use because of behavior or work performance, or as part of a required annual physical.

Testing applicants. Table 1 shows the local policies of the police departments in the survey that had some type of drug testing program. Of the 24 departments, 15 conducted tests of job applicants, and in all 15 departments applicants were rejected when the tests were positive. The survey did not request information on the percentage of applicants rejected. However, local newspapers have reported that 20 to 25 percent of the applicants for uniformed positions in some large urban departments have shown positive urinalysis results.

In Texas, a recently enacted State law places greater emphasis on law enforcement's responsibility to hire drug-free employees. Specifically, the law states that a person may not become a peace officer, jailer or guard of a county jail, or a reserve law enforcement officer unless the person is "examined by a licensed physician and is declared in writing by the physician to show no trace of drug dependency or illegal drug usage after a physical examination, blood test, or other medical test." In disputed cases, an applicant may be ordered to submit to an examination by a State appointed physician for certification that an applicant is not dependent on drugs and does not use illegal drugs.

Testing probationary officers. Testing probationary officers is a standard procedure in some police departments. The New York City Police Department recently administered urinalysis tests for drugs, including marijuana, to more than 5,000 probationary officers. Only 18 officers (0.35 percent) showed positive results. While the probationary officers knew they would be tested three times between their recruitment date and the end of their 18-month probationary period, they did not know the exact dates of testing.

Testing officers in sensitive jobs. Some departments require testing as a condition for transfers or promotions to sensitive jobs such as vice and narcotics, internal affairs, SWAT teams, and data processing. Officers may be asked to sign an agreement that, as part of accepting a new position, they will take periodic drug tests to demonstrate freedom from drug dependency and abuse. In these instances, the testing is considered voluntary and is a condition of seeking and accepting a new position.

Testing tenured officers. Departments test tenured officers for several reasons. In many instances officers can be required to submit to a test when they are suspected of drug use. Suspicion can occur as a result of a job performance review, a specific incident (such as a traffic accident or shooting), or an internal affairs investigation.

Periodic testing of tenured officers may also be a precondition for employment. For example, Boston Transit police officers agree to allow periodic testing when they are hired, and one department in the survey includes a drug test as part of an officer's annual physical.

Scheduled versus random testing. One of the most controversial issues involves random testing of officers. Union opposition to random testing of tenured officers is almost universal and, as noted in the discussion of legal issues that concludes this *Brief*, the courts have tended to support the position that random tests violate the Fourth Amendment rights of employees.

Scheduled testing, such as testing as part of the annual physical exam for all employees, has not been as severely criticized as random testing. Scheduled testing allows an employee to stop using drugs temporarily just prior to the tests, but it may still deter some officers from using drugs. It has the additional advantage of becoming an expected, routine part of the physical examination, which reduces objections based on privacy issues.

Table 1

Job categories and events tested in surveyed departments (N = 24)

Job category and event tested	Number of Departments	Percent
Job applicant	15	62.5%
Probationary officers	5	20.8
Officers seeking transfer to sensitive jobs	3	12.5
Officers in sensitive jobs	4	16.7
Officers suspected of drug use	18	75.0
After auto accidents	2	8.3
Scheduled testing	1	4.2

Technology of drug testing

A number of questions and issues have been raised about the types and accuracy of tests departments use to detect drugs. Most departments surveyed administer an initial test, such as EMIT (Enzyme Multiplied Immunoassay Technique), followed by confirmatory tests for samples with positive results, using gas chromatography/mass spectrometry. Of the 18 departments responding to a question about who conducts the tests, 12 said they use outside private labs, 3 use their jurisdictions' crime labs, 1 uses its State Health Department, 1 uses a local hospital, and 1 uses the health unit of the police department.

The EMIT test is popular because it is relatively inexpensive and has a reputation for accuracy. Gas chromatography and gas chromatography/mass spectrometry are even more accurate and are considered necessary to ensure that the initial EMIT results are correct. Even when both tests are used, a possibility remains that "false positives" will occur. For this reason, most departments conduct a further investigation for employees who show positive results on these tests and contest the results.

Police departments must also consider other aspects of drug screening technology. For example, "threshold" levels must be established to determine when a result should be considered positive. This is analogous to the standard of 0.10 percent for blood-alcohol content to presume intoxication. However, drug urinalysis tests are used to prove an individual has recently used drugs, while blood-alcohol tests are used to determine impairment at the time of the test.

If the threshold level is too low, then the test results may be considered positive even though the individual may have been exposed to the drug in a passive setting such as breathing marijuana smoke in a closed room. At the other extreme, if the threshold level is set too high, the dependent user may not provide a positive result from the test.

Procedural safeguards also must be established when conducting these tests. Tests should be administered as though the results will become part of a legal proceeding. The chain of custody must be documented—records must be kept on everyone who physically handles the sample—and all samples must be properly labeled, stored, and protected in an appropriate manner. Further, personnel who supervise and administer the testing process must be properly trained, and laboratory technicians must be experienced and certified in the use of the test equipment.

Counseling versus termination

Police administrators face difficult decisions when an officer tests positive, and further investigation confirms that the officer is a drug user. Even though the officer's job performance may be exemplary, many police chiefs agree that termination is the only solution.

The decision to terminate an officer is generally made for several reasons. First, the officer has possessed an illegal substance. Second, the investigation shows that the officer has associated with known felons in the acquisition of the illegal drug. And finally, the department may risk civil liability for knowingly employing drug abusers.

On the other hand, some police administrators have endorsed employee assistance programs similar to the Boston Police Stress Program. Assistance programs are available for officers who have problems with alcohol, drugs, or a combination of these substances. In some agencies, however, participation in programs not endorsed by the department does not protect the employee from disciplinary action if the department discovers the employee's drug problems. As a result, employees who voluntarily enter assistance programs often feel additional pressure to make sure their participation is not known to members of the department.

A number of departments are taking steps to make recruits and officers more aware of the problems associated with drug abuse. The New York Police Department has developed a drug awareness videotape and a 3-hour drug awareness workshop. In addition, the training manuals of the New York Police Academy now include a special booklet on drug abuse. In Philadelphia, the Fraternal Order of Police has produced a videotape encouraging officers with drug use problems to seek professional help. Police managers may use these training sessions to clarify departmental policy and to ensure that officers have accurate expectations with regard to privacy issues and sanctions surrounding drug abuse.

The personal side of drug abuse

A recent article in a large city newspaper describes drug use by police officers in terms other than statistical results. At the time the article appeared, the officer had already resigned from the police department and was enrolled in a residential treatment program for substance abuse.

The former officer is the son of a police sergeant and had been introduced to drugs at private schools and at college. While in college, he became dependent on cocaine and eventually abandoned college after his sophomore year.

A month before taking his medical entrance exam to the department, he stopped using cocaine and remained free of drugs for nearly a year, through the police academy and for the first few months on the force. After several months, however, he again started using cocaine and within a few weeks he was "freebasing" (inhaling purified cocaine fumes) every week. Almost a year later, he was spending nearly his entire paycheck on cocaine.

He was finally ordered off active duty and told to see a department psychologist after repeatedly showing up late for work and frequently calling in sick. After he missed counseling appointments and additional days of work, the department ordered him to take a urine test. He took the test, but knowing that the results would be positive, he resigned the day of the test, before the results came in.

Legal standards for testing employees for drugs

The United States Supreme Court has held that intrusions "beyond the body's surface" are searches within the meaning of the Fourth Amendment to the Constitution.[1] Under the privacy provisions of the Fourth Amendment, individuals have a reasonable expectation to be free from bodily intrusions by the government or an employer. This expectation of privacy clearly extends to the seizure of one's body fluids.

The Fourth Amendment only protects individuals from unreasonable

searches and seizures. Thus, courts must decide whether a police department's drug testing is reasonable under the circumstances. Reasonableness will be determined by balancing the employee's expectation of privacy against the department's policies and interest in testing employees for drug abuse.

Generally, the department's interest is the safety of the public and other employees. In fact, the chief executive has a responsibility to review each officer's job performance and ensure that it does not jeopardize the safety of the community. It is generally recognized that the employer has a duty to prevent an employee from causing an unreasonable risk of harm to others.[2] This duty covers all types of employee problems that may affect job performance, including alcohol and drug use and psychological and physical impairments. In these situations, a department may be held legally liable if it knew, or should have known, that an employee was unable to exercise his or her job responsibilities in a careful and proper manner.

In determining the reasonableness of employee drug testing, courts will probably look at three general issues:

- the justification for the tests;
- the likelihood of employee impairment while on the job; and
- the reliability of the tests and procedural safeguards.

With regard to the first issue, most drug testing of police officers can be justified as being in the public interest. It is reasonable to conclude that the safety of the community could be endangered by police officers who are impaired by drugs.

The second issue courts will address concerns the degree of suspicion required before drug tests can be imposed on officers. It has been established in several jurisdictions that officers can be required to take drug tests when department supervisors have a reasonable suspicion that the officers are impaired by drugs.[3] Clearly reasonable and objective standards related to job performance or fitness for duty are favored by courts to avoid drug tests at an employer's "unfettered discretion."[4] Examples of department drug tests performed on reasonable suspicion of drug impairment include testing officers after vehicle accidents, accidental firearm discharges, excessive force incidents, high absenteeism, and other clear indications of unusual job performance.

Drug testing on reasonable suspicion contrasts with random testing of all officers. The desire for a drug-free police force may not be compelling enough for many courts to condone random testing of officers. The New York Supreme Court recently barred the New York City Police Department from conducting random tests in the Organized Crime Unit on the rationale that the tests violated the Fourth Amendment rights of employees.[5] The city has appealed the decision.

While no case law specifically addresses the practice of mandatory routine drug testing of tenured police officers (e.g. as part of routine annual physical examinations for the purpose of determining fitness for duty), analysis of related court opinions leads to the conclusion that such a practice, if uniformly and properly administered, might be more acceptable to the courts than random drug testing.

Finally, the courts will be concerned with the third issue—the reliability of the tests and the procedural safeguards—as it relates to ensuring the fundamental due process rights of employees as guaranteed by the Fourteenth Amendment.[6] To satisfy reliability concerns, the National Institute of Drug Abuse recommends that a confirmation test (e.g., gas chromatography) always be given after a positive test result. Expert testimony may be required if the results of the tests are contested in court.

Procedural safeguards that ensure that drug testing will be carried out in a reasonable manner should be clearly enumerated in a department's drug testing policy. Examples of the procedural safeguards found in court opinions include: employee notification, chain of custody of the specimens, confidentiality of test results, and the right to appeal the findings.[7] Since a positive finding may result in dismissal proceedings, these procedural safeguards must generally be consistent with the jurisdiction's regular administrative regulations, collective bargaining agreements, and, where applicable, the Police Officer's Bill of Rights.

Union issues

Unions are understandably concerned with the movement of police agencies toward drug testing of officers. Unions believe that drug testing is a recent change in working conditions and as such must be submitted for collective bargaining. This issue is currently being litigated in Florida.[8]

Many of the union concerns coincide with the court's concerns, including the standards for drug concentration levels present in the urine, the reliability of the tests, the confidentiality of results, and procedural safeguards. However, unions are also very concerned with the action departments take when an officer's test results show the presence of drugs. Police unions prefer that management give as much attention to employee assistance programs as to dismissal.

Because of the limited litigation in the area of employee drug testing, many jurisdictions are proceeding cautiously in establishing and enforcing drug testing policies and procedures. While departments recognize the need to act responsibly and fairly, they also realize that even successful litigation can be very expensive and time consuming.

Notes

1. *Schmerber* v. *California*, 384 U.S. 757 (1966).

2. *Division 241, Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976) cert. denied 429 U.S. 1029 (1976).

3. *Maurice Turner* v. *Fraternal Order of Police*, No. 83-1213, decided November 13, 1985, D.C. Court of Appeals.

4. *McDonnell* v. *Hunter*, 612 F.Supp. 1122 (S.D. Iowa 1985).

5. *Philip Caruso, President of P.B.A.* v. *Benjamin Ward, Police Commissioner*, New York State Supreme Court, Part 37, Index No. 12632-86.

6. *Allen* v. *City of Marietta*, 601 F.Supp. 482 (N.D. Georgia 1985).

7. *Banks* v. *F.A.A.*, 687 F.2d 92 (5th Cir. 1982).

8. *Fraternal Order of Police (Miami Lodge 20)* v. *City of Miami*, Case No. CA-85-041, Public Employees Relations Commission, State of Florida.

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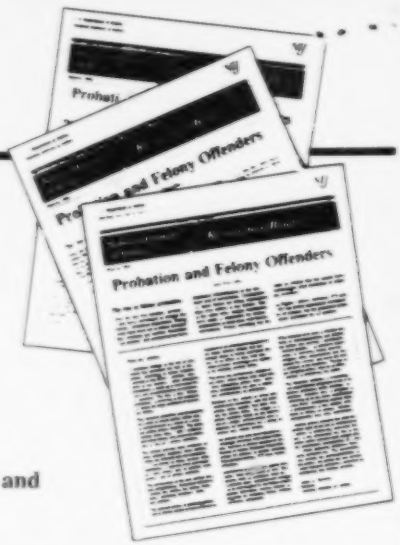

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